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IN THE

Supreme Court of the United States

JACK GRANITI

Petitioner

v.

BUENA VISTA HOME VIDEO, INC.,
MARJA KELLY

On Petition For Writ Of Certiorari
To The Second District Court of Appeal
for the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a sexual harassment case tried under the California analog to Title VII, 42 U.S.C. 2000e, et seq, should the jury have been instructed, consistent with *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), that the conduct complained of should be viewed from the perspective of a reasonable person in the same position as the plaintiff (here, a gay male)?

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STATEMENT OF JURISDICTION

By opinion filed March 15, 2000 [App. 1], California's Second District Court of Appeal affirmed the trial court's judgment upon a jury verdict in respondents' favor.

By order dated April 3, 2000, the court of appeal denied rehearing [App. 32], and by order dated June 2, 2000, the California Supreme Court denied review [App. 33].

Jurisdiction is posited upon the well recognized rule that "[S]tate fair employment practice laws are explicitly made part of the Title VII enforcement scheme", *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 477, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982), coupled with the Court's recognition that state decisions of state law which are implicate federal law, e.g. first amendment concerns, allow the Court to review the propriety of those state decisions, *Milkovich v. Lorain Journal*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) ("We granted certiorari [citation] to consider the important questions raised by the Ohio courts' recognition of a constitutionally-required `opinion' exception to the application of its defamation laws", 497 U.S. at 10).

Here, the California courts, indeed, the very division of the second appellate district court of appeal that decided this case, has recognized that *Oncale*, supra, is controlling on the issue presented by citing and quoting from the case repeatedly in its decision in *Beyda v. City of Los Angeles*, 65 Cal.App.4th 511 (1998), at pp. 517 & 519 (a case of some notoriety as it involved allegations of sexual harassment directed against a sitting Los Angeles City Councilman).

Petitioner contends certiorari should be granted under Supreme Court Rule (10)(c) as the court of appeal's opinion represents a decision on "an important federal question in a way that conflicts with relevant decisions of this Court".

STATEMENT OF THE CASE

This petition seeks review of a judgment entered upon a jury verdict in a sexual harassment case with a bit of a twist, a female, respondent Marja Kelly, harassing a subordinate male, petitioner Jack Graniti, who unbeknownst to her was gay while they both worked at respondent Buena Vista Home Video, Inc.

As Kelly's counsel put it in opening statement, "No one is going to stand up here, not me, not Marja, not any of the witnesses that you hear testify, and tell that Marja was a Victorian lady or that she is a Victorian lady" [RT 110]. Indeed, in the next breath **counsel admitted to the jury that during a company retreat in Laguna Beach in June of 1995, Kelly "made a comment to the effect she would give anyone a blow job who would go skinny dipping" with her** [RT 113].

Though petitioner assigned multiple counts of error while traveling through the state court system, the sole issue in this petition for certiorari is the propriety of the trial court's refusal to give a jury instruction petitioner had requested which would have informed the jury that the conduct complained of should be viewed from the perspective of a gay male.

In defining the essential elements of the hostile work environment claim, petitioner requested an instuction saying, in pertinent part, that "The environment created by the conduct would have been perceived as intimidating, hostile, abusive, or offensive by a reasonable person of the same gender and sexual orientation as the plaintiff" [state court APX 1789]. The trial court struck the language "and sexual orientation" [state court APX at 2146] which petitioner contended throughout the proceedings below was error.

The issue was first raised when petitioner submitted his jury instructions before trial [state court APX 1789], addressed thereafter in his opening brief (pp. 45-47), in his

petition for rehearing (pp. 2-6) after the court of appeal sidestepped the issue in its opinion by (App. 8), and in his petition for review to the California Supreme Court (pp. 14-15).

Rather than meet petitioner's contention, the court of appeal disingenously parroted respondents' strawman argument that since petitioner hadn't revealed his orientation while employed with respondent Buena Vista to respondent Kelly (or anyone else at work other than a small circle of friends) or sued for sexual orientation harassment, that he wasn't entitled to the language stricken by the trial court [App. 8].

Petitioner contends the court of appeal's treatment of the issue not merely ignores but thumbs its nose at this Court's directive that "**[T]hat the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering `all the circumstances'**", *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201 (1998).

QUESTION PRESENTED FOR REVIEW

In a sexual harassment case tried under the California analog to Title VII, 42 U.S.C. 2000e, et seq, should the jury have been instructed, consistent with *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), that the conduct complained of should be viewed from the perspective of a reasonable person in the same position as the plaintiff (here, a gay male) ?

I

A SUMMARY OF THE EVIDENCE AT TRIAL AND THE INSTRUCTION PETITIONER REQUESTED

A. An overview of what the jury heard.

"[I]n the interest of both brevity and dignity" at this stage respondent Kelly's behavior need be "describe[d]. . . only generally", *Oncale*, supra at p. 77.

As the court of appeal noted, upon his arrival at Buena Vista Home Video's accounting department on January 30, 1995, Graniti was assigned to the same workgroup in which Kelly worked, and practically immediately she began a graphic running commentary upon what she believed were the sexual practices of various men she believed were gay, using traditionally derisive and bigoted language, e.g. fag, faggot, butt pirate, to refer to them, even referring to the company president as a "f---ing lesbian"; another management employee also testified he heard Kelly refer to people in this way [App. 2].

Additionally, "In the first month that appellant was with Buena Vista, he worked in an area away from his work group. During that month, Kelly would frequently come to him, and ask him personal and sexual questions" [App. 3].

"In approximately early March, Kelly expressed a personal interest in appellant to co-worker and friend Todd Greenfield. The next day Kelly called Greenfield to apologize and said she was embarrassed." [App. 3].

In mid-March petitioner attended a company sponsored event, the "Pulp Fiction" party, where Kelly's manner of dancing with him made him so profoundly embarrassed and humiliated that he walked off the dance floor; as the court of appeal acknowledged, "Kelly insisted that appellant dance with him, and `kept grabbing me by my arms and yanking me

on the dance floor'" [App. 3-4], and when he refused her repeated requests that he stay overnight at her apartment afterwards, she ignored him at work the following day [App. 4].

When Human Resources, with whom Graniti began meeting after the Pulp Fiction party, was unable to arrange a transfer for Graniti out of the accounting department, Graniti took it upon himself to be transferred away from Kelly's workgroup [App. 5].

At a mandatory company retreat in June held in Laguna Beach, Kelly renewed her overtures to Graniti throughout one evening while on board a ship cruising about the harbor while those on board had dinner, then when a number of employees were at a bar after dinner awaiting their bus ride back to the hotel, "an inebriated Kelly propositioned that she would perform oral sex on any man who went 'skinny dipping' with her" [App. 5].

While at the Laguna retreat, Graniti learned that he was scheduled to go on an inventory trip to Livona, Michigan, in July and that Kelly had said that would be a good opportunity to straighten out their problems, prompting Graniti to withdraw from the trip, with the result that the accounting department manager left a phone message with Human Resources that "there may be a problem within her department" [App. 5-6].

In mid July Graniti lodged an internal complaint of sexual harassment, and in early August resigned from Buena Vista [App. 6].

B. The jury instruction in issue.

For several decades, the Los Angeles County Judges have promulgated standardized jury instructions, Book of Approved Jury Instructions (West Publishing, 8th ed.), otherwise known as "BAJI".

Shortly before this case was tried in the fall of 1997, the "BAJI Committee" (composed of sitting and retired Los Angeles County judges, and members of the local plaintiff and defense trial bar) first promulgated standardized instructions for employment discrimination, harassment, retaliation and termination cases brought under California Government Code §§ 12900 et seq, the Fair Employment and Housing Act ("FEHA"), BAJI 12.00 et seq.

Petitioner submitted a modified version of the BAJI instruction, 12.05, defining the essential elements of the claim for hostile work environment:

Plaintiff seeks to recover damages based upon a claim of hostile environment harassment. The essential elements of this claim are:

1. The defendant was an employer;

2. The plaintiff was an employee of defendant;

3. The defendant's agents, supervisors or employees engaged in harassing conduct toward the plaintiff;

4. Plaintiff's sex was a motivating factor of this harassment;

5. This conduct was unwelcome and sufficiently severe or pervasive that it had the purpose or effect of altering the conditions of plaintiff's employment and creating an intimidating, hostile, abusive, or offensive working environment;

6. The environment created by the conduct would have been perceived as intimidating, hostile, abusive, or offensive by a reasonable person of the same gender **and sex-**

ual orientation as the plaintiff;

7. The environment created was perceived by the plaintiff es intimidating, hostile, abusive, or offensive; and

8. This environment caused plaintiff injury, damage, loss, or harm.

Harassment based gender upon includes, but is not limited to:

1. Verbal harassment, such as epithets, derogatory comments, or slurs;

2. Physical harassment, such as an assault, or unwelcome touching, or interference with normal work or movement;

3. Visual forms of harassment such as derogatory posters, cartoons or drawings;

4. Unwanted or unwelcome sexual advances which condition an employment benefit upon an exchange of sexual favors.

Harassment because of sex includes gender harassment.

Loss of tangible job benefits is not necessary to establish hostile environment harassment. In determining whether an environment is hostile or abusive, you must consider all of the circumstances. These may include frequency of the offensive conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

State Court APX at 1789-1790.

The court of appeal noted correctly that the trial court gave the instruction after striking the language "**and sexual orientation**" from item number 6 [App. 8].

II

THE TEACHING OF *ONCALE*

The Court handed down *Oncale*, supra, a few months after the verdict in respondents' favor, well before the court of appeal here rendered its decision. *Oncale* taught that

> **We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances."** [citation] In same-sex (as in all) harassment cases, **that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.** A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field--even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. **The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.** [emphasis added]

Oncale v. Sundowner Offshore Services, Inc. (1998) 523 U.S. 75, 81, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201. Indeed, this same division of the second district court of appeal quoted portions of the highlighted text in its published opinion in *Beyda v. City of Los Angeles*, supra, at pp. 517 & 519.

It hardly requires a citation to authority to appreciate that a gay male would likely be far more offended by, and uncomfortable with, Kelly's antics and overtures than would a straight male.

Moreover, in California,

> To prevail on a claim of instructional error, the appellant must show a reasonable probability of a more favorable result in the absence of the error. This determination depends heavily on the particular nature of the error, and its effect on the appellant's ability to place his or her full case before the jury. Actual prejudice must be assessed in the context of the trial record; article VI, section 13 of the California Constitution requires us to examine "the entire cause, including the evidence" to determine whether the verdict was prejudicially affected. We evaluate instructional errors by considering (1) the state of the evidence, particularly conflicts on critical issues; (2) the effect of other instructions; (3) **the effect of counsel's argument, particularly whether the respondent's arguments to the jury may have contributed to the misleading effect of the instructional error;** (4) any indication by the jury that it was misled; and (5) the closeness of the verdict. These factors apply both to erroneous instructions . . . and to the omission of required instructions . . .

Daum v. Spinecare Medical Group, Inc., 52 Cal.App.4th 1285 (1997), at 1313-1314; see also *Buzgheia v. Leasco Sierra Grove*, 60 Cal.App.4th 374 (1998), at 396, where the court recognized the argument of counsel could exacerbate the instructional error.

That is exactly what occurred here. Respondent's counsel in summation argued that the court had not instructed that the standard was a gay man, but merely a man, period, and the jury was to consider this because whichever of Kelly's

comments or overtures it found to have occurred would not be as offensive to a man as they would be if made by a man to a woman:

> Now you have heard the court define sexual harass-ment, that the conduct has to be severe and perva-sive or a hostile environment, that it has to be abusive or offensive, considered that by a reason-able person of Mr. Graniti's gender which is anoth-er way saying someone who is male. **Not by the way, someone who is a gay male. [¶] This is not a sexual orientation case. The standard is a reasonable man. And there is a reason they put "man" in there. And woman is the other way because people have different perspectives. Sexes actually have some difference in perspectives. The question is are those something severe or pervasive that would make it a hostile work environment for a reasonable man.**

RT 1042.

Petitioner agrees with respondents in this regard: a straight male would probably not be as offended by either sober or drunken offers of oral sex, e.g., as Kelly by her counsel's admission made to an assemblage of her co-workers at the June 1995 Laguna retreat, as would a female be offended by such an offer from a male.

It is hardly a stretch to acknowledge that just as a female would have "different perspective" on such an overture from a male, that a gay male would have a "different perspective" on hearing such an overture from a won't-take-no-for-an-answer female such as Kelly. The jury should have been instructed that any conduct it found to have occurred "should be judged from the perspective of a reasonable person in the plaintiff's position, considering `*all the circumstances*'", *Oncale*, supra, i.e., a gay male. The failure to do so was prejudicial, and the rather transparent tap dance per-

formed by the the court of appeal here to get avoid reversal only underscores the fact of prejudice.

III

THE FAILURE OF THE COURT OF APPEAL HONESTLY TO ADDRESS THE ISSUE

> **"[W]e understand as well as the next court how to . . . articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. [All judges] know how to mouth the correct legal rules with ironic solemni-ty while avoiding those rules' logical consequences."**

TXO Production Corp. v. *Alliance Resources Corp.*, 509 U.S. 493, at 500, 113 S.Ct. 2711, at 2742, 125 L.Ed.2d 366 (1993), O'Connor, J., dissenting, and quoting from *Garnes v. Fleming Landfill Inc.*, 186 W.Va. 656, at 666, 413 S.E.2d 897, at 907 (1991).

The trial court's error was not merely prejudicial, but by the time the case reached the court of appeal, particularly glaring as well in light of the decision in *Oncale*, supra, and the BAJI committee's revision of the pertinent part of the instruction to conform to the case's teaching.

In its present form BAJI 12.05 defines the sixth essential element of a hostile environment claim as follows: " *The environment created by the conduct would have been perceived as intimidating , hostile, abusive, or offensive by a reasonable person* ***in the same position as the plaintiff***" (West Publishing, January 2000 pocket part). The current version of BAJI 12.05 is effectively the same instruction that petitioner requested and the trial court refused.

The focus of the 1998 revision of the instruction by the BAJI Committee, and petitioner's proposed modification

of the then current version of 12.05 when the case was tried in late 1997, was and is the perspective of the victim of the harassment. The opinion's discussion of sexual orientation harassment is a non-sequitur to avoid having to decide the issue petitioner was raising.

It is instructive to compare the versions of BAJI 12.05 that plaintiff requested at the time the case was tried (~~stricken~~ language is indicated in ~~strike-out~~) and after the BAJI committee revised the instruction to be consistent with the teaching of *Oncale*:

BAJI 12.05 in 1997 as modified & requested by appellant [APX 2145-2146]:	**BAJI 12.05 unmodified following the 1998 revision (West, January 2000 pocket part):**
Plaintiff seeks to recover damages based upon a claim of hostile environment harassment. The essential elements of this claim are:	Plaintiff [also] seeks to recover damages based upon a claim of hostile environment harassment. The essential elements of this claim are:
1. The defendant was an employer;	1. The defendant ~~was~~ a[n] [employer] [_____] (other);
2.The plaintiff was an employee of defendant;	2. The plaintiff was an [employee of] [applicant for employment with] defendant;
3. The defendant's ~~agents, supervisors or~~ employees engaged in ha-rassing conduct	3. The defendant engaged in harassing conduct directed toward the plaintiff, or plaintiff

toward the plaintiff;	personally witnessed the harassing conduct and it took place in [his] [her] immediate work environment;
4. **Plaintiff's sex was a motivating factor of this harassment;**	4. **[protected status] was a motivating factor of this harassment;**
5. This conduct was unwelcome and sufficiently severe or pervasive that it had the purpose or effect of altering the conditions of plaintiff's employment and creating an intimidating, hostile, abusive, or offensive working environment;	5. This conduct was unwelcome and sufficiently severe or pervasive that it had the purpose or effect of altering the conditions of plaintiff's [prospective] employment and creating an intimidating, hostile, abusive, or offensive working environment;
6. The environment created by the conduct would have been perceived as intimidating, hostile, abusive, or offensive by **a reasonable person of the same gender ~~and sexual orientation~~ as the plaintiff;**	6. The environment created by the conduct would have been perceived as intimidating, hostile, abusive, or offensive by **a reasonable person in the same position as the plaintiff;**
7. The environment created was perceived by	7. The environment created was perceived by

the plaintiff as intimidating, hostile, abusive, or offensive; and

8. This environment caused plaintiff injury, damage, loss, or harm.

Harassment based upon gender includes, but is not limited to:

1. Verbal harassment, such as epithets, derogatory comments, or slurs;

2. Physical harassment, such as an assault, or unwelcome touching, or interference with normal work or movement;

3. Visual forms of harassment such as derogatory posters, cartoons or drawings;

4. Unwanted or unwelcome sexual advances ~~which condition an employment benefit upon an exchange of sexual favors.~~

the plaintiff as intimidating, hostile, abusive, or offensive; and

8. This environment caused plaintiff injury, damage, loss, or harm.

Harassment based upon [protected status] includes, but is not limited to:

1. Verbal harassment, such as epithets, derogatory comments, or slurs;

2. Physical harassment, such as an assault, or interference with normal work or movement;

3. Visual forms of harassment such as derogatory posters, cartoons or drawings;

4. Unwanted or unwelcome sexual advances which condition an employment benefit upon an exchange of sexual favors.

Harassment because of sex includes gender harassment.	Harassment because of sex includes gender harassment, and harassment based on pregnancy, c-hildbirth or a related condition.
{no comparable provision in 1997 BAJI 12.05}	Sexual harassment need not be motivated by sexu-al desire or sexual gratification.
Loss of tangible job benefits is not necessary to establish hostile environment harassment. In determining whether an environment is hostile or abusive, you must consider all of the circumstances. These may include frequency of the offensive conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.	Loss of tangible job benefits is not necessary to establish hostile environment harassment. In determining whether an environment is hostile or abusive, you must consider all of the circumstances. These may include frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Here, had petitioner claimed sexual orientation discrimination and/or harassment, he would have inserted the appropriate language in item 4 of the essential elements definition, and also modified the highlighted language "*Harassment based upon gender includes, but is not limited to*:" so that it also contained language referring to sexual orientation.

Petitioner did not insert "*sexual orientation*" in item 4 defining the essential elements of the claim, or in the language preceding the list of conduct which could constitute harassment, because he does not now and did not then contend that Kelly's harassment was based upon his orientation as a gay man.

What petitioner has consistently contended at each stage in the proceedings is that the trier of fact should be instructed to view the conduct from the perspective of the victim, which is exactly what the Court taught in *Oncale*. Indeed, the BAJI use note to the 1998 revision and still current version of 12.05 refers specifically to *Oncale*.

Had petitioner's case been tried after the 1998 decision in *Oncale* and the BAJI committee's revision of 12.05, he would have received the benefit of the case's holding and the more carefully tailored jury instruction as a matter of right.

CONCLUSION

Given the importance of state court fair employment practices statutes play in Title VII's enforcement, and the court of appeal's egregious refusal to follow *Oncale*'s clear command that the conduct complained of be viewed from the perspective of the victim, certiorari should be GRANTED, and upon full briefing and argument, the judgment REVERSED.

DATED: August 29, 2000

Respectfully submitted,
JOHN ELSON,
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By:_____
JOHN ELSON
Attorney for petitioner
JACK GRANITI

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JACK GRANITI, Plaintiff and Appellant, BUENA VISTA HOME VIDEO, INC., et al. Defendants and Respondents.	B 118016 (Super. Ct. No. BC149580) COURT OF APPEAL - SECOND DIST. FILED MAR 15 2000 JOSEPH A. LANE Clerk Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald E. Cappai, Judge. Affirmed.

John Elson for Plaintiff and Appellant.

Quinn, Emanuel, Urquhart, Oliver & Hedges, William C. Price and Eric J. Emanuel for Defendants and Respondents.

Appellant, Jack Graniti, appeals from a judgment on a special verdict in favor of his former employer, defendant Buena Vista Home Video, Inc. (Buena Vista), and a former co-worker, defendant Marja Kelly (occasionally respondents). Appellant's suit was based on claims of sexual harassment by Kelly.

Appellant contends the judgment should be reversed on multiple grounds: instructional error; exclusion of evidence;

abuse of discretion in limiting appellant's time for presentation of his case and requiring appellant to follow a specific order of presentation of witnesses; and abuse of discretion in denying his request to amend his first amended complaint. We conclude that the court committed no instructional, case management or evidentiary error, and that no prejudice has been demonstrated in connection with appellant's request to amend. We affirm the judgment.

FACTS[1]

Appellant, a gay man, began working for Buena Vista on January 31, 1995. He did not disclose his sexual orientation at work. On his first day at Buena Vista, defendant Scott Shulman, who had initially interviewed him, welcomed appellant to his work group. The group consisted of appellant, Dina Rau, defendant Kelly, and Shulman, who was the supervisor of the group. Kelly did not interview appellant or hire him, and had no authority to give him a pay performance review or to fire him. Shulman called the group "the nucleus, "' and told appellant the members of the group worked together, ate together, and went out together.

Within days of appellant's employment, Kelly made comments and jokes about homosexuals. When employee Robert Kanner passed by appellant's cubicle, Kelly commented, "Oh, he's a faggot. He takes it up the a--." Kelly also called employee Gary Bell a "faggot." When another employee by the name of Stan introduced himself to appellant while Kelly was present, she asked appellant why he was talking to Stan. Appellant asked Kelly if she knew Stan, and she said, "Yeah, he' s a butthole, he takes it up the a--." Kelly called the president of Buena Vista a 'f --- ing lesbian." Kanner also heard Kelly refer to people in this way.

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[1] Relevant facts from the trial are also contained in portions of the "DISCUSSION" section of our opinion.

Soon after appellant was employed by Buena Vista, there was a Mammoth ski trip which appellant did not attend. When Kelly returned from the trip, she told appellant "a bunch of them had shared a cabin together, that they had fun together and drank a lot, danced a lot and had a good time." Kelly said Rau performed a "dollar bills trick" and Kelly propositioned to perform her own "tricks" for appellant. Kelly described herself as "a good f---when ... stoned." Surprised by Kelly's statements, appellant had no response.

In the first month that appellant was with Buena Vista, he worked in an area away from his work group. During that month, Kelly would frequently come to him, and ask him personal and sexual questions.

In late February, appellant inadvertently wore to work a gold ring that his significant other, Justin Webber, had given him. Appellant "made it a point to never wear the ring to work because ... it is something that by nature just being a gold band drew attention." Kelly asked appellant about the ring. Initially, he said he did not want to talk about it, but because of Kelly's persistent questioning of whether he was married, appellant eventually told her that he once was. He told her that his wife had been killed in a car accident a year before and that he was wearing the gold band in remembrance of his wife.

In approximately early March, Kelly expressed a personal interest in appellant to co-worker and friend Todd Greenfield. The next day Kelly called Greenfield to apologize and said she was embarrassed.

In mid-March, appellant attended a "Pulp Fiction" party after asking Kelly if he needed to attend and being told that he did. At the party appellant danced with Kelly. At first Kelly danced "face-to-face" with appellant, but then she "started moving around. And the first thing she did was move behind me and when she moved behind me, she would embrace me from behind and start grabbing my chest while dancing directly behind me." Co-worker Robert Kanner thought that

Kelly was "draped" over appellant. Kanner made eye contact with appellant, who looked "very uncomfortable." Appellant moved Kelly's hands from him, "and then she came dancing in front of me, just laughing." Kelly then rhythmically moved down, "bending her knees and moving down towards my waist side. And as she did that she put her hand around me and started grabbing my buttocks. That's when I pushed her away and said, 'Come on, Marja, none of that.'" Kelly then laughed, began dancing again and went behind appellant. He got disgusted and walked off the dance floor." Kelly insisted that appellant dance with him, and "kept grabbing me by my arms and yanking me on the dance floor."

The day after the party, Kelly ignored appellant the entire morning. Appellant expressed his concerns to Kanner, who recommended that appellant contact Karen Wiktor-owicz, the head of Human Resources. Appellant met with Wiktorowicz either at the end of March or in the first week of April. Appellant confided that he felt uncomfortable at work and threatened, and was contemplating quitting. Appellant told Wiktorowicz that he was experiencing problems with bigotry, invasion of privacy and harassment. He told Wiktorowicz that he needed her to waive the requisite that he have worked six months at Buena Vista before he could transfer. According to Wiktorowicz, appellant did not want her to investigate what was occurring in his work group.

In May, appellant met with Wiktorowicz again, and told her that conditions had become so intolerable at his division that if she was not going to obtain a transfer for him, he would have to quit. At that meeting, when Wiktorowicz asked appellant if there was a sexual problem, he answered yes but insisted that he did not want to discuss the problem, and just wanted the transfer. According to Wiktorowicz, at this second meeting appellant said he did not want to socialize with the people in his work group. Wiktorowicz responded that he did not have to socialize with anyone, that he was at Buena Vista to work. At this meeting, appellant brought up the subject that

a co-worker had told appellant that he did not want to work on a certain floor because there are "faggots" on that floor.

Wiktorowicz did not obtain a transfer for appellant, but he was able to obtain one himself soon after he met with Wiktorowicz in May. The transfer went into effect the day before an annual company training retreat which was held in Laguna. Appellant was told attendance at the retreat was mandatory. At the retreat, Kelly and the other members of appellant's former work group did not speak to appellant for the most part. During the retreat's dinner cruise, Kelly came up behind appellant, started grabbing his shoulders, arms and back, and began massaging him. She then "collapsed" on appellant, whispering unintelligibly in his ear. Appellant asked Kelly to get off of him, and eventually Kelly complied. Later that evening, appellant and his co-workers took a shuttle bus which dropped them off at a bar. At the bar Kelly again came from behind appellant and grabbed him. Appellant told Kelly to stop, and she did. Later, though, when appellant went to the dance floor, Kelly approached appellant from behind, grabbed his behind and said, "let's dance." Appellant told her he did not want to dance, but she kept grabbing him and insisting until he walked away. While appellant was waiting for the bus to return to the hotel, an inebriated Kelly propositioned that she would perform oral sex on any man who went "skinny dipping" with her. Ultimately, appellant rode on the same bus as Kelly, but she did not sit next to appellant.

At the Laguna retreat, Greenfield told appellant that he was scheduled to travel to Lavona, Michigan with Kelly in July 1995. The decision of who was going on the trip was made at the retreat by Sally Knutson, Director of Accounting, and Bill Cahalen, the manager of inventory. In reaching this decision, Knutson and Cahalen considered "how much work people had to do and the timing of those assignments." Greenfield explained that Kelly had requested that appellant go on the trip "so she could straighten things out with [him] and find out what the problem was." Ultimately, appellant

went to Knutson and requested that he be excused from the trip. She agreed, and he did not attend. That same evening, Knutson called Human Resources and left a message for Mary Lou Walker that she thought there may be a problem within her department.[2]

At the end of July 1995, appellant turned in a written complaint of sexual harassment. Afterward, he spoke to Walker, and then Wiktorowicz, who was at home bedridden after having back surgery. After appellant made his complaint, Kelly remained in the same cubicle, which was close to appellant's cubicle. She received a reprimand memorandum from Human Resources which was to remain in her permanent personnel file.

On August 11, 1995, appellant submitted a letter of resignation.

Appellant filed a complaint against Disney Enterprises, Inc. (erroneously sued as the Disney Company), Kelly and Shulman (erroneously sued as Schulman) asserting five causes of action. The first cause of action is for sex discrimination in violation of California Constitution, article I, section 8, alleging that appellant was constructively discharged. The second cause of action is for retaliatory harassment in violation of public policy in response to appellant's complaint of unlawful working conditions. The third cause of action is for battery in violation of Penal Code section 242, and alleges that Kelly engaged in offensive touchings from March 1995 through June 1995. The fourth cause of action asserts sexual battery in violation of Civil Code section 1708.5, and the fifth cause of action is for intentional infliction of emotional distress.

Thereafter, appellant filed an amendment to the complaint naming Buena Vista instead of Doe 1.

Appellant filed a first amended complaint adding sexual

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[2] Walker is also identified by the last name Gregory in portions of the record.

harassment and sex discrimination as the second cause of action. As part of the preliminary allegations incorporated by reference into the second cause of action, appellant alleged that soon after he reported to work, Kelly made unwelcome overtures "to embark upon a social and sexual relationship." Notwithstanding the fact that appellant declined the overtures, Kelly persisted. "KELLY's overtures and invitations ... were sufficiently notorious so as to attract the attention and provoke comment from other employees ... assigned to work as financial analysts....[¶] For example, but not by way of limitation, in March of 1995 plaintiff along with defendants KELLY and SCHULMAN [*sic*] attended a social function ... in connection with the release of the motion picture 'Pulp Fiction' on home video, at which function KELLY behaved in an openly harassing and offensive manner towards plaintiff... [¶] ... After the 'Pulp Fiction' social function, defendant KELLY began to ostracize plaintiff, and encouraged others in their workgroup to do so. . . ."

The second cause of action for sexual harassment and sex discrimination alleged that Kelly violated Government Code section 12940 et seq. because of her unwelcome attentions and touchings of appellant, and that their employer violated the law by failing to ameliorate appellant's employment conditions after supervisor Shulman's knowledge and appellant's complaint to the employer's human resources department. As a result of these violations, appellant was allegedly constructively discharged.

Shulman moved for judgment on the pleadings, and Disney and Kelly each moved for summary adjudication as to all causes of action. The court granted the motions of Shulman and Disney, removing them from the action, and granted Kelly's motion to the first, third, fourth, fifth and sixth causes of action.

The matter proceeded to jury trial on the second cause of action for sexual harassment as to defendants Buena Vista and Kelly. The jury returned a special verdict finding Kelly not

liable for sexual harassment. The trial court entered a judgment on the special verdict in favor of Buena Vista and Kelly.

DISCUSSION

Instructional Error

1. Sexual Orientation:

Appellant contends that the trial court committed error by modifying his proposed version of BAR No. 12.05. Appellant's proposed instruction included the following language: "The environment created by the conduct would have been perceived as intimidating, hostile, abusive, or offensive by a reasonable person of the same gender and *sexual orientation* as the plaintiff." (Italics added.) The trial court deleted the words "and sexual orientation" in the version it gave the jury. Appellant argues that "the jury should have been instructed to view Kelly's conduct from the perspective of a male of plaintiff's orientation, not from that of a straight male. . . ." We disagree.

Appellant made a conscious effort to hide his sexual orientation at work and even from his parents. He testified, "I never disclosed to people my orientation." To the contrary, he gave the impression that he was not gay, having told Kelly that he was married before. Additionally, appellant's complaint does not raise the issue of sexual orientation as a basis for relief. Nor did the FEHA provide for such a claim at the time this action was filed and processed. (*Gay Law Students Assn.* v. *Pacific Tel.& Tel. Co.* (1979) 24 Cal.3d 458, 491.)[3] Absent any claim or evidence of sexual orientation discrimination, the trial court was correct in not including the phrase within the instruction.

2. Quid Pro Quo Instruction:

Appellant requested that the trial court instruct the jury

on quid pro quo sexual harassment. The trial court denied appellant's request, which he now asserts was error.

Subdivision (h) of Government Code section 12940 makes it an unlawful employment practice for an employer to harass an employee "because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age.... Harassment of an employee ... by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."

"California case law recognizes two theories upon which sexual harassment may be alleged. The first is quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances. The second is hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. [Citation.]" (*Mogilefisky* v. *Superior Court* (1993) 20 Cal.App.4th 1409, 1414.)

Appellant contends there was sufficient evidence to support a theory of quid pro quo harassment. He refers to his testimony that on his first day of work, his supervisor, Shulman, called the work group a "nucleus" and explained that this is a group "in which we worked together, ate together, partied together. When we went out, we all -went out. When we went home, we all went home; along those lines. [¶] ... [¶] When we're promoted, we're all promoted." Appellant refers to other testimony from himself that he approached Kelly and asked if he needed to attend the "Pulp Fiction" party, telling her he was uncomfortable with going. Appellant testified that Kelly said he needed to attend, "we as a group were going to be

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[3] Respondents note that in 1999 FEHA has been amended to include "sexual orientation" as an unlawful employment practice.

going. . . ." Appellant also points out Kanner's testimony that if appellant had not attended the "Pulp Fiction" party, "it wouldn't have looked, unless it was a good reason, very favorable." Significantly, appellant omits mention of Kanner's next comment, "He wasn't forced to [attend]." He also omits to mention that even though Kelly had urged him to attend the Mammoth trip, he did not attend. Appellant last cites a particular portion of Wiktorowicz's testimony regarding appellant's second meeting with her, claiming that Wiktorowicz admitted that she was aware that appellant felt pressured to socialize because he received the "cold shoulder" from his co-workers.

Appellant does not reference further testimony Wiktorowicz gave on the subject. When asked about appellant's complaint regarding socializing, she responded: "The second meeting he said he didn't want to socialize.... And I remember very clearly saying to him you're here to work, you don't have to socialize with anyone."

Other than the evidence appellant "felt pressured" from members of his group to socialize with them, there is no evidence that appellant's employment was linked to his having to submit to these social entreaties or to unwelcome sexual advances. To the contrary, appellant repeatedly refused Kelly's sexual advances and did not attend some of the social events. Additionally, Shulman testified that he discussed having appellant move away from Kelly, but that appellant insisted on staying even though he called Kelly caustic and abrasive. When appellant asked to be excused from the Lavona trip, which Kelly was scheduled to go on, he was granted his request.

We conclude that the evidence was insufficient to support an instruction based on "quid pro quo" harassment. Therefore, the trial court did not err in refusing to give the requested instruction.

3. Special Instructions 7 and 8:

Appellant claims the trial court erred in refusing to give his proposed special instructions 7 and 8. Special instruction

no. 7 reads: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Special instruction no. 8 reads: "An employee must be defined as a supervisor if he exercises any one of these powers. The law does not require the powers described be exercised during any definite part of the employee's time. It is the existence of the power which determines the classification of whether an individual is an employee or a supervi sor."

Appellant contends that these instructions were important for the jury to determine whether Kelly was merely a co-employee or a supervisor whose conduct would subject Buena Vista to strict liability. Again, we disagree. No evidence suggests that Kelly had any supervisory powers over appellant. Shulman was appellant's supervisor and Kelly was denied promotion to Shulman's position when he left because of appellant's sexual harassment complaint against her. Absent evidence to support the theory, the trial court did not err in refusing to give the instructions.

The Court's Order Limiting Trial Time and Delineating the Order of Witnesses

Appellant contends that the trial court abused its discretion in limiting available trial time to five or six days and in delineating the order in which his first three witnesses would be called.

The issue arose at the final status conference held on September 24, 1997. Prior to this date, appellant had filed a document titled "Notice of Increase in Amount Time Needed to Try This Case," in which appellant estimated a need of 17

to 20 days to try the matter.[4] In response to the filing of this document, the court issued an order that each side was to present to the court detailed witness statements which included "an offer of proof as to the facts to be testified to by each witness, the source of the accuracy of the testimony and time estimate."[5] At the status conference, the court noted that since receiving the original trial estimates, it had "resolved the matter as to all causes of action except for a single cause of action for sexual harassment. And that claim is being made by the plaintiff against two remaining defendants." Addressing appellant's counsel, the court commented, "it should have been obvious from the court's minute order provided so rapidly after receipt of this notice of increase . . . that the court would not sit idly by and allow you to increase the time estimate, when the court had decreased the issues to be presented to the trier of fact." The court then ordered as follows:

"This case will be tried in five to six days, and I will make certain that it is tried in five or six days. And as I review your witness list, it's not going to be a difficult task, because many of these witnesses are going to be precluded based upon the witness list and the proffered prove that you presented to the court.

"Now have in mind, Mr. Elson, that the court has clear authority pursuant to Evidence Code section 320 to regulate the order of proof. And in that regard, the court intends to regulate the order of proof.

"In this case the plaintiff will call the plaintiff, the defendant Marja Kelly and Scott Shulman first. The plaintiff may decide in whichever order those three witnesses shall be called, but those three witnesses shall be called first."

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[4] Appellant's initial trial estimate had been ten days and respondents had estimated ten to twelve days. Based on these estimates, and its review of the nature of the case, the trial court assigned an original estimate of seven to ten days for trial.

The issue was reprised the following Monday after the court had ruled on various motions in limine. The court ruled as follows:

"Now, based upon the motions in limine and the court's rulings thereto, it's obvious to the court that certain evidence as proffered by [appellant] may be irrelevant to these proceedings. I have made those rulings on those issues as presented to me.

"But in order for this court to make knowledgeable and intelligent decisions as to A, the admissibility of evidence, and B, as to the preclusion of certain evidence and witnesses based upon the witness lists and the proffered testimony as presented to this court, this court determines that within its discretion it has the power to determine the order of proof.

"And in exercising that discretion, this court determines that when the testimony is first presented to this trier of fact [appellant] shall testify first in these proceedings. The court determines by doing this, the court will best be able to enforce its rulings on the motions in limine by having the plaintiff present all relevant evidence as to any alleged sexual harassment directed to or witnessed by [appellant]. This would more concisely and definitively come from [appellant's] testimony, followed by that of Marja Kelly and then Scott Shulman.

"So the court will, as I indicated, direct the order of proof and order [appellant] to call [appellant] to the stand first in these proceedings."

At this point, counsel for appellant objected and argued that he believed he had been "blindsided." The court responded:

"Mr. Elson, the court noted on the record when you were last before the court that when the court made its initial ruling with regard to the order of proof, the court

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[5] In response to this order, appellant filed a witness list with 38 witnesses. Each witness was identified as well as the subject of the expected testimony of each witness.

had not read the motions in limine, and I so indicated to you. And I also indicated to you that based upon my cursory review of those motions, that I would most likely reassess the order that I had given with regard to the order of proof and make additional modifications.

"So your claim that you were blindsided in this regard is not supported by the record, No. 1.

"No. 2, the court, as I previously indicated, had not read the motions in limine. The court was not aware as to how far [appellant] wished to stray from the relevant issues in this case until the court read all of the motions in limine and the oppositions filed.

"And now that I'm aware ofjust how far [appellant] wishes to stray with regard to irrelevant material, I'm going to put a stop to it. And the manner in which I feel I can put a stop to it is to make [appellant] get on the witness stand and tell the jury just all those matters that [appellant] contends comprise sexual harassment. And once I have been presented with that, then I may make more knowledgeable decisions as to which witnesses to preclude, what subjects to preclude."

Appellant's argument in regard to these two limitations focuses primarily on his inability to call Mary Lou Walker (Walker) as a witness at trial. Except for his inability to call Walker as a witness, appellant has failed to demonstrate how these rulings prejudiced his case. We turn to the issue of Walker's availability.

Walker was employed by Buena Vista in the Human Resources department and the person who helped Wiktorowicz investigate appellant's sexual harassment complaint. Walker was identified in plaintiff s witness list as follows: "Former[ly] The Walt Disney Company senior staffing consultant who will testify of her assianment to BVHV from 1994 until she left in 1996, and her extensive involvement in the investigation into [appellant's] formal 7-19-95 complaint of sexual harassment which included conducting interviews,

apprising BVHV executives of course of investigation, [appellant's] contacts with herself and H.R. Director Karen Wiktorowicz during investigation and afterwards, what investigation revealed, who was to be disciplined and what discipline was to be imposed, [appellant's] continuing complaints of hostile work environment and his requests to be transferred."

Counsel for appellant first brought the court's attention to a potential problem with Walker's attendance late on Wednesday afternoon, October 1, after appellant's trial testimony had concluded and the jury had been dismissed for the day. The following exchange took place.

"MR. ELSON: Your Honor, Marylou Walker is moving to Northern California, moving away. I don't have an address or phone number where she is. She's under subpoena and she will come here if she's still in Los Angeles because she's leaving Friday.

"THE COURT: This has to do with your problem with regard to having to pay her expenses if we're not ready for her as fits her schedule?

"MR. ELSON: It has to do with my not being able to get her back here, period. I don't know how to reach her in Northern California. And I repeatedly requested an address or phone number from her. So far today she hasn't provided it. When I put her under subpoena she had no idea she was moving away.

"MR. PRICE [counsel for respondents]: Your Honor, her deposition was taken on Saturday. Mr. Elson has been in communication with her and did get a declaration from her. He could have asked her on the record where she was going to be.

"THE COURT: Mr. Elson, we're going to proceed as I indicated we shall proceed. If that's a request to call this witness out of order, that request is denied."

When trial reconvened the next day, appellant called

Marja Kelly as a witness without further discussing the issue of Walker's availability. Kelly's testimony was concluded that afternoon and the jury was excused until Monday,

October 6.[6] On Monday, October 6, appellant called the following witnesses, respectively: Scott Shulman, Sally Knutson, and Karen Wiktorowicz. Late in the afternoon of October 6, after the jury had been excused for the day and Upon inquiry by the court, counsel for appellant told the court he expected his remaining witnesses to be Todd Greenfield, Christine Benigo, Jacqui Hallstrom, Robert Kanner, Tamorah Hunt, and to "read very briefly" from Walker's deposition. The court advised counsel for both parties that excerpts proposed to be read should be reviewed by the parties so that it could rule on any objections beforehand. Counsel for respondents agreed and concluded his remarks as follows: "And one other thing, Your Honor, I think Mr. Elson needs to make a showing of unavailability before he would read this transcript in. He faxed us a letter yesterday saying [Ms. Walker] was going to testify tomorrow, listing her as a witness. I think there has to be a showing of unavailability." The court concurred with this statement. Ultimately, the court concluded that appellant failed to demonstrate Walker's unavailability and precluded appellant from introducing evidence from her deposition. (See the discussion, *infta.*)

Evidence Code section 320 provides: "Except as otherwise provided by law, the court in its discretion shall regulate the order of proof." Citing Witkin's textbook on evidence, appellant tenders the point that "the order in which each party presents his own evidence and calls his own witnesses is largely a matter of trial strategy, and counsel are usually allowed relatively complete control." (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1708, p. 1668.) We do not disagree with this statement. However, unless an abuse of discretion is shown, no error has been demonstrated. We cannot so conclude.

The original rulings were made at the final status conference on Wednesday, September 24, 1997. That Saturday, September 27, Walker's deposition was taken and she advised counsel for appellant that she would be moving. On Monday, September 29, the court reopened the issues discussed at the final status conference and made the further ruling regarding the order of the first three witnesses. At no point did counsel for appellant advise the court that the rulings may interfere with his ability to call Walker as a witness. The issue of Walker's availability was first addressed late on Wednesday, October 1, at which time counsel for appellant presented no specific information, or evidence, to demonstrate she would not be available. It is only in hindsight, because the trial court refused to admit portions of Walker's deposition, that these rulings obtain significance. We cannot conclude that an abuse of discretion has been established.

Even with hindsight, we cannot conclude that the trial court abused its discretion. One of the bases for the trial court's ruling related to the order of witnesses was so that it would have their testimony in aid of determining potential objections during the later stages of trial. Walker was not a percipient witness to the various harassing incidents. Rather, she came upon the scene after the fact as an investigator. Thus, most of the information she obtained was hearsay and would not be admissible unless and until a proper foundation had been laid to meet one or more of the hearsay exceptions. That foundation would depend upon testimony by other witnesses, especially appellant, Kelly, Shulman and Wiktorowicz.[7]

Exclusion Of Evidence

Appellant contests the exclusion of Walker's deposition testimony, notes of her investigation, evidence regarding the

[6] The court was not in session on this case on Friday, October 3, 1997.

Marina Del Rey party, and testimony from Denise Schmitz.

1. Deposition Testimony of Walker:

For deposition testimony to be admissible at trial in lieu of attendance by the witness, the deponent must be unavailable as a witness within the meaning of Evidence Code section 240. (*Chavez* v. *Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 118.) As pertinent, that section provides:

"(a) Except as otherwise provided in subdivision (b), 'unavailable as a witness' means that the declarant is any of the following:

"(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

"(2) Disqualified from testifying to the matter.

"(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

"(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

"(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

"(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying."

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[7] For example, Walker may have been able to testify to prior consistent or inconsistent statements by various witnesses, but only after evidence had been presented during trial making such statements relevant. (Evid. Code, §§ 770, 1235 and 1236; *People* v. *Zapien* (1993) 4 Cal4th 929, 953.)

The burden is upon the party seeking to introduce the deposition to establish one or more of the above factors, including due diligence. "'What constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. [Citation.] The term is incapable of a mechanical definition. It has been said that the word "diligence" connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citation.] The totality of efforts of the proponent to achieve presence of the witness must be considered by the court. Prior decisions have taken into consideration not only the character of the proponent's affirmative efforts but such matters as whether he reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available [citation], whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised.' [Citation.]" (*People* v. *Sanders* (1995) 11 Cal.4th 475, 523.)

The standard of review is a mixed one: "This court has not decided the standard of review for a trial court's determination on the issue of reasonable diligence. [Citation.] In *People* v. *Jackson* (1980) 28 Cal.3d 264, 312, we treated due diligence under Evidence Code section 240 as a 'factual question to be determined by the trial court according to the circumstances in each case,' and its ruling 'will not be disturbed unless an abuse of discretion appears.' We subsequently reexamined the standard of review: 'Properly considered, due diligence in procuring a witness's[] attendance appears to be a mixed question of law and fact.... [I]n addressing it the court must ... determine the underlying facts, select the applicable legal standard, and apply the latter to the former. [¶] The proper standard for mixed questions appears to be independent review.' [Citation.] The Courts of Appeal are divided on this issue. [Citation.]" (*People* v. *Sanders, supra*, 11 Cal.4th at p. 523.)

Here, the trial court apparently concluded that appellant

had not been diligent in procuring Walker's attendance at trial. The evidence is undisputed that appellant served Walker with a subpoena for attendance at trial, apparently on June 7 at the first session of her deposition. Thus, the focus is on factors (4) and (5) of Evidence Code section 240.

The issue of Walker's availability was addressed on Tuesday, October 7:

"THE COURT: The record will reflect we're in session. The jury is not present.

"With regard to the issue of the deposition testimony of Ms. Walker, Mr. Elson, the court recalls and the record will reflect, that when this case first commenced last week you indicated to the court on the record that Ms. Walker had been served, but that if she were not called last week that she would be leaving for Northern California and you would have to pay for her plane fare to return here to Los Angeles. That's what the record reflects.

"Counsel have taken issue with the fact that this witness has not been established to be unavailable within the meaning of the code. How is this witness unavailable within the meaning of the code?

"MR. ELSON: She declined before she left to give me either the address or phone number to which she was relocating. As recently as I believe a week ago today she indicated that she would return, but when I spoke to her Tuesday evening a week ago, at that time she declined to give me her address and phone number in Northern California because her husband was within ear shot and she did not want him to know where she was going.

"I called her the following day Wednesday and spoke to her. And her attitude had changed and she advised that she would not give me the phone number or address where she was moving to. And her tone of voice was markedly different, guarded, not cooperative.

"I spoke again to her on Thursday, requested that information. She declined to provide it. She said she had the flu,

was not feeling well, did not want to be bothered. She said she would call me over the weekend and she failed to do so. I spoke to her, I guess her present husband, though they are separated, Saturday night. He had heard from her, she made no mention of where she -- the address or phone number. And he further told me that she had indicated to him that she was upset about having to appear in this matter. And according to him she actually left early to avoid having to appear.

"She did not call me over the weekend. I called him again last night requesting information, if he had it, as to her whereabouts. He professed to be unaware. He had given me what he thought was the spelling of her stepfather's name in Huntington Beach. It turned out there was no listing in Huntington Beach for this person, the stepfather with whom her mother presently resides.

"My investigator did a search using her social security number and got two potential phone numbers in Northern California. I called them both and was advised, this was last night, that there was no Marylou at that phone number, that I had the wrong party. She has refused to give me the information as to where I could locate her. I have the subpoena here reflecting that she was served. She was in fact served on the record.

"THE COURT: You may file the subpoena with the clerk.

"MR. ELSON: Thank you.

"THE COURT: That is the subpoena you indicated was served while she was in this jurisdiction?

"MR. ELSON: Yes, sir. It was served June 7th at her deposition on the record.

"THE COURT: Give it to the clerk. It will be filed.

"Now, what's the defendant's response.

"MR. PRICE: Your Honor, I know we received a fax from Mr. Elson on Sunday saying that Ms. Walker would be a witness. We asked him over the weekend to tell us whether she was going to appear by depo or not so we could make the arrangements last night. I know Ms. Walker testi-

fied at her deposition on September 27th that Mr. Elson had prepared a declaration for her trying to oppose that deposition.

"And on that date she said she was going to be moving to Santa Cruz at the end of that week. At that time she was in contact with Mr. Elson. Mr. Elson at that time didn't attempt to ask her on the record where are you going to be.

"Frankly, I think he prefers to read in her deposition testimony and did not make an effort to try and keep in contact with her. He could have done so on the record when he had her there at the deposition, which he opposed her appearance to file the declaration on her behalf.

"THE COURT: So the record is clear, what is the defendant's objection?

"MR. PRICE: The objection, Your Honor, she is -- Mr. Elson has not established her unavailability.

"THE COURT: Mr. Elson, how is this witness unavailable within the meaning of Evidence Code section 240?

"MR. ELSON: Your Honor, I don't even know where I would have the Marshall go to execute a body attachment order. She did not want to be asked her whereabouts because she is trying to keep those whereabouts from her present husband whom she left. When she was deposed on I think it was Saturday, September 27th, she was still cooperative and had indicated that she would return.

"She did an abrupt about-face in the middle of last week. I don't know where to have a body attachment order executed. She refused to call me this weekend, despite having represented, I think it was Thursday, to do so, to tell me so I could make arrangements to have her flown down here. From her husband's comments, she left just to avoid appearing here.

"THE COURT: Mr. Elson, the court is, if you request, prepared to issue a body attachment for this witness, but you will have to provide the clerk with the necessary information. If you provide the clerk with the necessary information the court will issue the body attachment.

"As far as the court is concerned you haven't established that this witness is unavailable within the meaning of Evidence Code section 240. And any request to read the testimony of this witness from deposition is denied.

"MR. ELSON: May I just have the record reflect that I was practically on bended knee twice last week pleading with this court to allow her to be taken out of order while she was still in town. I think I raised that subject the first day of trial, and at some point during the balance of the week I again raised it. And your position was we would address that when the testimony of Mr. Shulman was concluded.

"THE COURT: The record so reflects, Mr. Elson. And the record also reflects the quality of the testimony of those witnesses that have been called last that you wanted to call first. As far as I'm - concerned, this record will clearly reflect that the court's decision and insistence upon controlling the order of proof was necessary and has had the result that the court intended it to have.

"MR. ELSON: Your Honor, I have a last known address in North Hollywood, but I will represent to the court when we were at her house Saturday, September 27th, for a deposition there were boxes strewn about with her belongings being packed up. She has decamped to I don't know where. And I'm not sure what you would have me do to secure her attendance if I can give you an address in North Hollywood and the Marshal can go there and come back empty handed.

"The address is 11542 Otsego, O-t-s-e-g-o, Hollywood, California.

"THE COURT: The clerk will provide you with the required form to be completed for the body attachment. After you have completed the form, I will issue the body attachment and set $500 bail on the body attachment. The body attachment will remain outstanding until the trial is concluded."[8]

We turn first to the fourth factor, inability of the court to compel Walker's attendance. We cannot conclude this factor applies. Appellant had served Walker with a subpoena while she was within the jurisdiction. But for the failure of appellant to timely provide the necessary information for the court to issue a body attachment, the court could have secured her attendance.[9] Thus, the issue advances to the fifth factor, whether appellant demonstrated sufficient diligence in attempting to obtain Walker's presence. We cannot so conclude.

The insurmountable problem with which we are faced is a lack of evidence in the record to establish that Walker was in fact not available. The best that can be gleaned from the record is that appellant served Walker with process in June and thereafter expected that she would cooperate in keeping appellant apprised of her availability. On Saturday, September 27, appellant learned that Walker's availability may be a problem. On Tuesday September 30, it became apparent that Walker was not cooperating, and on Wednesday counsel for appellant was concerned enough to bring the matter to the attention of the court. However, counsel did not request court intervention to enforce the subpoena. At that time it is possi-

[8] No information was provided to the clerk so a body attachment could be issued.

[9] Appellant argues that Code of Civil Procedure section 2025, subdivision (u) provides authority for use of Walker's deposition. As pertinent, that section states: "(3) Any party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds any of the following: [T] (A) The deponent resides more than 150 miles from the place of the trial or other hearing." It is true that this would normally be applicable because the witness is beyond subpoena power of the court. (Nizinski v. State Bar (1975) 14 Cal.3d 587, 590.) However, appellant had obtained service on Walker while she was within the jurisdiction.

ble that Walker was still at her last known residence and could have been served with a body attachment. The following Tuesday, when counsel tendered the subpoena to the court, the court requested that appellant provide the, necessary inforn ation to the Clerk for issuance of a body attachment but counsel had insufficient infori ation to do so. We cannot conclude that service of process more than three months prior to trial, and counsel's belief that Walker would cooperate, is sufficient to demonstrate diligence, especially when appellant had insufficient information to aid the court in enforcement of the process. (*People* v. *Mendieta* (1986) 185 Cal.App.3d 1032, 1036-1039; *People* v. *Redd* (1969) 273 Cal.App.2d 345, 349-351.)

2. Walker's Investigation Notes:

Appellant contends that notes of witness statements made by Walker during her investigation should have been admitted under one or more of the hearsay exceptions.

First, he contends that the interviews constituted authorized admissions falling within the exception of Evidence Code section 1221. That section provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

Appellant's argument is premised on the testimony of Wiktorowicz that "the purpose of the interviews was for her to find out what did or didn't happen, and based on the interviews Wiktorowicz made the decisions (1) to discipline Kelly, and (2) what discipline would be imposed. . . ." We disagree with this premise. Section 1221 requires reference to a specific and definite statement made by a third person under circumstances which naturally calls for a party to deny or otherwise comment on the statement. The fact that an investigative report is reviewed and action is taken does not indicate acquiescence with any particular statement attributed to a witness

identified in the report.

Next, appellant contends that many of the statements were authorized admissions of a party falling within Evidence Code section 1222. That section states: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if [¶] (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and [¶] (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

As with the prior argument, we cannot agree that notes of interviews taken in connection with an internal investigation qualify as an authorized admission of Buena Vista. First, while Walker was charged with investigating the incident and transmitting information to Wiktorowicz, there is no evidence that Walker was invested with authority to divulge any of the information on behalf of Buena Vista as evidence of truth of the statements. More importantly, there is no evidence that Buena Vista, or a person authorized by Buena Vista, ever proffered any statement contained within the investigative report under circumstances suggesting that Buena Vista authorized the statement be made on its behalf. These facts distinguish this case from the cases cited by appellant, *O'Mary* v. *Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563 and *W. T Grant Co.* v. *Superior Court* (1972) 23 Cal.App.3d 284.

Finally, appellant urges that the notes constitute business records and are admissible under Evidence Code section 1271. That section states: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other

qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

As with the prior two exceptions, we conclude this one does not apply. There is no doubt that Walker was acting within the course of business when she undertook the investigation and that she was seeking information relating to alleged acts, conditions, and events. However, the investigation was not made within the scope contemplated by the exception: to establish a contemporaneous record of the act, condition, or event as evidence of the act, condition or event. Rather, the investigation was undertaken after the various incidents to obtain information to verify the allegations made by appellant. While we agree that under appropriate circumstances investigative notes may fall within this exception, subdivision (b) requires that the record be made "at or near the time of the act, condition, or event." Here, the in-vestigation was undertaken months after many of the alleged acts or events occurred. (See *People* v. *Bazaure* (1965) 235 Cal.App.2d 21, 38-39 [so-called "incident" report made 30 days after the event did not qualify for treatment under the business records exception].) The problem with treating a delayed investigation as a business record centers on trustworthiness of statements attributed to witnesses regarding past events; witnesses who, because of the passage of time, may forget or who may have developed a bias or prejudice regarding the matter.

3. Evidence Relating to the Marina Del Rey Party:

Appellant contests the trial court's ruling on respondents' motion in limine numbered 2, which excluded any reference to what occurred at a private party held in Marina Del Rey. Appellant attended the party and alleges that during the party Kelly fondled him and exhorted him to have sex with her. As legal support for his position, he cites and quotes the following passage from *Doe* v. *Capital Cities* (1996) 50 Cal.App-4th

1038,1048: "'Unwelcome sexual conduct perpetrated by an agent, supervisor, or co-worker, which occurs elsewhere but is in some fashion work-related also constitutes sexual harassment within the meaning of the [FEHA].' [Citation.]"

During trial, Greenfield testified that the party in Marina Del Rey was a private party held in honor of his cousin having passed the Bar, and that a few Buena Vista employees attended the party, including Kelly. We have previously concluded that there was insufficient evidence to establish appellant's required attendance at these private gatherings. As such, we agree with the trial court that the incident was not relevant to sexual harassment arising within a work-related environment.

4. Exclusion of Denise Schmitz's Testimony:

Appellant contests the trial court's decision to not allow testimony from Denise Schmitz, an employee in Liu's working group.[10]

We have previously referenced discussions between the court and counsel at the final status conference and on the first day of trial when the court ruled on the order of the first three witnesses. At the same time, the court reserved its right to further limit witnesses and evidence to be presented by the parties. After hearing appellant testify, and just before Kelly took the stand, the court announced that it would preclude multiple witnesses on appellant's witness list "if there isn't any change after the conclusion of the defendant's testimony..." Among the witnesses contemplated to be excluded was Schmitz.

After Wiktorowicz testified, but before co-worker Todd Greenfield testified, the court noted that it had re-read appellant's "Revised Request for Permission to Call Witnesses at Trial", and it reiterated that it would not allow Schmitz to testify.

According to appellant's witness list, Schmitz was to "testify as to her own experiences being sexually harassed by

a male in the BVHV [Buena Vista] accounting department, her experiences with Kelly in BVHV office, e.g. Kelly's propensity to talk about sex in the office and behavior at company sponsored social events outside the office, what she observed of Kelly's behavior towards plaintiff, in particular Kelly's manner of speaking to plaintiff and Kelly's assumption of role of being plaintiff s functional supervisor which was unique in BVHV accounting department, what plaintiff told her re: Kelly's conduct and comments, her knowledge of difficulties plaintiff had in accomplishing transfer from Shulman workgroup in June of 1995 to Liu workgroup to which Schmitz was assigned, plaintiff s increasing emotional distress when situation not dealt with by BVHV, and being interviewed as part of investigation into plaintiff's complaint."

While evidence of acts of sexual harassment of other employees "may be relevant to the determination of a hostile work environment," the plaintiff must either witness the other incidents or provide evidence of plaintiff s knowledge of the other incidents. (*Beyda* v. *City of Los Angeles* (1998) 65 Cal.App.4th 511, 515519.) Appellant has not cited to evidence that he witnessed the alleged sexual harassment of Schmitz or that he was aware of it at the time. Consequently, the foundation for admission of the evidence was lacking.

What appellant told Schmitz regarding Kelly's conduct is clearly inadmissible hearsay, offered to prove the truth of the matter stated. (Evid. Code, § 1200.) Schmitz's knowledge of appellant's alleged difficulty in transferring out of Shulman' s workgroup and the fact Schmitz was also interviewed is, at best, of marginal relevancy. (Evid. Code, §§ 210, 350.) As for Schmitz's observation of Kelly's conduct toward appellant, there were other witnesses who testified about her conduct, Greenfield and Kanner. We cannot conclude the trial court abused its discretion in precluding the evidence.

Denial of Leave to Amend Complaint

Appellant maintains that the trial court abused its discretion in denying leave to amend appellant's first amended complaint.

Appellant's motion was made on the grounds that appellant erroneously sued the Walt Disney Co. as the Disney Co., that his actual employer was Buena Vista, that he sought to hold Walt Disney Co. or Disney Enterprises, Inc., which answered appellant's complaint, liable for any personnel functions performed for Buena Vista, and that he wanted to add a cause of action alleging that the Disney entities, Buena Vista and Shulman "failed to take all reasonable steps to prevent harassment from occurring, in violation of Government Code § 12940."

In light of the jury's verdict, and our conclusions above, we cannot find that appellant was prejudiced by the court's determination. The proposed second cause of action for sexual harassment and sex discrimination in violation of Government Code section 12940 et seq. alleges the same conduct as the first amended complaint.

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[10] Appellant also mentions the court's decision not to allow testimony from. Buena Vista Vice President Mitch Koch, but does not make any argument regarding this decision. Accordingly, we deem the issue waived. (*San Francisco Street Artists Guild* v. *Scott* (1974) 37 Cal.App.3d 667, 670, fn. 1.)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 4

DATE: April 3, 2000

John Elson
Box 686
Reddley, CA 93654

GRANITI, JACK
Plaintiff And Appellant
v.
BUENA VISTA HOME VIDEO, INC.
Defendant-Respondent

B118016
Los Angeles, County No. BC149580

THE COURT:

Petition for Rehearing is denied.

Second Appellate District, Division Four, No. B118016
S087784

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

SUPREME COURT
FILED
JUN 2 - 2000
Fredrick K. Ohlrich, Clerk
DEPUTY

JACK GRANITI, Appellant

v.

BUENA VISTA HOME VIDEO, INC. Et Al., Respondents

Appellant's petition for review DENIED.

GEORGE

Chief Justice